

Internal Revenue Service, Treasury

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[T.D. 8411, 57 FR 15241, Apr. 27, 1992; 58 FR 17516, Apr. 5, 1993; as amended by T.D. 8733, 62 FR 53386, Oct. 14, 1997]

§ 301.7701(b)-1 Resident alien.

- (a) *Scope.* Section 301.7701(b)-1(b) provides rules for determining whether an

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alien individual is a lawful permanent resident of the United States. Section 301.7701(b)-1(c) provides rules for determining if an alien individual satisfies the substantial presence test. Section 301.7701(b)-2 provides rules for determining when an alien individual will be considered to maintain a tax home in a foreign country and to have a closer connection to that foreign country. Section 301.7701(b)-3 provides rules for determining if an individual is an exempt individual because of his or her status as a foreign government-related individual, teacher, trainee, student, or professional athlete. Section 301.7701(b)-3 also provides rules for determining whether an individual may exclude days of presence in the United States because the individual was unable to leave the United States because of a medical condition. Section 301.7701(b)-4 provides rules for determining an individual's residency starting and termination dates. Section 301.7701(b)-5 provides rules for applying section 877 to a nonresident alien individual. Section 301.7701(b)-6 provides rules for determining the taxable year of an alien. Section 301.7701(b)-7 provides rules for determining the effect of these regulations on rules in tax conventions to which the United States is a party. Section 301.7701(b)-8 provides procedural rules for establishing that an individual is a nonresident alien. Section 301.7701(b)-9 provides the effective dates of section 7701(b) and the regulations under that section. Unless the context indicates otherwise, the regulations under §§ 301.7701(b)-1 through 301.7701(b)-9 apply for purposes of determining whether a United States citizen is also a resident of the United States. (This determination may be relevant, for example, to the application of section 861(a)(1) which treats income from interest-bearing obligations of residents as income from sources within the United States.) The regulations do not apply and §§ 1.871-2 and 1.871-5 of this chapter continue to apply for purposes of the bona fide residence test of section 911. See § 1.911-2(c) of this chapter. For purposes of determining whether an individual is a resident of the United States for estate and gift tax purposes, see § 20.0-1(b)(1)

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and (2) and § 25.2501-1(b) of this chapter, respectively.

(b) *Lawful permanent resident*—(1) *Green card test*. An alien is a resident alien with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. A lawful permanent resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. Resident status is deemed to continue unless it is rescinded or administratively or judicially determined to have been abandoned.

(2) *Rescission of resident status*. Resident status is considered to be rescinded if a final administrative or judicial order of exclusion or deportation is issued regarding the alien individual. For purposes of this paragraph, the term “final judicial order” means an order that is no longer subject to appeal to a higher court of competent jurisdiction.

(3) *Administrative or judicial determination of abandonment of resident status*. An administrative or judicial determination of abandonment of resident status may be initiated by the alien individual, the Immigration and Naturalization Service (INS), or a consular officer. If the alien initiates this determination, resident status is considered to be abandoned when the individual's application for abandonment (INS Form I-407) or a letter stating the alien's intent to abandon his or her resident status, with the Alien Registration Receipt Card (INS Form I-151 or Form I-551) enclosed, is filed with the INS or a consular officer. If INS replaces any of the form numbers referred to in this paragraph or § 301.7701(b)-2(f), refer to the comparable INS replacement form number. For purposes of this paragraph, an alien individual shall be considered to have filed a letter stating the intent to abandon resident status with the INS or a consular office if such letter is sent by certified mail, return receipt requested (or a foreign country's equivalent thereof). A copy of the letter, along with proof that the letter was mailed and received, should be retained by the alien individual. If the INS or a

consular officer initiates this determination, resident status will be considered to be abandoned upon the issuance of a final administrative order of abandonment. If an individual is granted an appeal to a federal court of competent jurisdiction, a final judicial order is required.

(c) *Substantial presence test*—(1) *In general.* An alien individual is a resident alien if the individual meets the substantial presence test. An individual satisfies this test if he or she has been present in the United States on at least 183 days during a three year period that includes the current year. For purposes of this test, each day of presence in the current year is counted as a full day. Each day of presence in the first preceding year is counted as one-third of a day and each day of presence in the second preceding year is counted as one-sixth of a day. For purposes of this paragraph, any fractional days resulting from the above calculations will not be rounded to the nearest whole number. (See § 301.7701(b)-9(b)(2) for transitional rules for calendar years 1985 and 1986.)

(2) *Determination of presence*—(i) *Physical presence.* For purposes of the substantial presence test, an individual shall be treated as present in the United States on any day that he or she is physically present in the United States at any time during the day. (But see § 301.7701(b)-3 relating to days of presence that may be excluded.)

(ii) *United States.* For purposes of section 7701(b) and the regulations thereunder, the term *United States* when used in a geographical sense includes the states and the District of Columbia. It also includes the territorial waters of the United States and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the United States and over which the United States has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources. It does not include the possessions and territories of the United States or the air space over the United States.

(3) *Current year.* The term *current year* means any calendar year for which

an alien individual is determining his or her resident status.

(4) *Thirty-one day minimum.* If an individual is not physically present for more than 30 days during the current year, the substantial presence test will not be applied for that year even if the three-year total is 183 or more days. For purposes of the substantial presence test, it is irrelevant that an individual was not present for more than 30 days in the first or second year preceding the current year.

(d) *Application of section 7701(b) to the possessions and territories*—(1) *Application to aliens.* Section 7701(b) provides the basis for determining whether an alien individual is a resident of a United States possession or territory that administers income tax laws that are identical (except for the substitution of the name of the possession or territory for the term “United States” where appropriate) to those in force in the United States. If, after the application of section 7701(b) and the regulations thereunder, an alien individual is a resident of the United States and a resident of a United States possession or territory, the principles of § 301.7701(b)-2 (d) (relating to significant contacts maintained by an individual with a foreign country) shall be applied in order to establish that the individual is a resident alien of either the United States or a United States possession or territory, but not both. See § 1.933-1 (a) of this chapter for determining whether an individual (including a U.S. citizen or national) is a bona fide resident of Puerto Rico. See section 931 and the regulations thereunder for the determination of whether an individual (including a U.S. citizen or national) is a bona fide resident of American Samoa.

(2) *Non-application to citizens.* Section 7701(b) does not provide the basis for determining whether a United States citizen or national is a bona fide resident of a United States possession or territory. For example, a United States citizen who is present in a United States possession or territory for 183 days during a calendar year will not automatically be a “bona fide resident” of that possession or territory.

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Whether a United States citizen or national is a bona fide resident of a possession or territory is determined under sections 931 through 933 and § 1.935-1 to the extent it remains effective after December 31, 1984.

(e) *Examples.* This section may be illustrated by the following examples:

Example 1. B, an alien individual, is present in the United States for 122 days in the current year. He was present in the United States for 122 days in the first preceding calendar year and for 122 days in the second preceding calendar year. In determining his status for the current year, B counts all 122 days in the United States in the current year plus $\frac{1}{3}$ of the 122 days in the United States in the first preceding calendar year ($40\frac{2}{3}$ days) and $\frac{1}{6}$ of the 122 days in the United States during the second preceding calendar year ($20\frac{1}{3}$ days). The total of $122+40\frac{2}{3}+20\frac{1}{3}$ equals 183 days. B meets the substantial presence test and is a resident alien for the current year.

Example 2. C, an alien individual, is present in the United States for 25 days during the current year. She was present in the United States for 365 days during the first preceding year and 365 days during the second preceding year. The substantial presence test does not apply because C is present in the United States for fewer than 31 days during the current year.

Example 3. D, an alien individual, is present in the United States for 170 days during the current year. He was present in the United States for 30 days during the first preceding year and 30 days during the second preceding year. In determining his status for the current year, D counts all 170 days in the United States in the current year plus $\frac{1}{3}$ of the 30 days in the United States in the first preceding calendar year (10 days) and $\frac{1}{6}$ of the 30 days in the United States during the second preceding calendar year (5 days). The total of $170+10+5$ equals 185 days. D meets the substantial presence test and is a resident alien for the current year notwithstanding the fact that he was present in the United States for fewer than 31 days in each of the two preceding years.

[T.D. 8411, 57 FR 15242, Apr. 27, 1992; 57 FR 28612, June 26, 1992; 57 FR 37190, Aug. 18, 1992]

§ 301.7701(b)-2 Closer connection exception.

(a) *In general.* An alien individual who meets the substantial presence test may nevertheless be considered a nonresident alien for the current year if the following conditions are satisfied—

(1) The individual is present in the United States for fewer than 183 days in the current year;

(2) The individual maintains a tax home in a foreign country during the current year; and

(3) Except as provided in paragraph (e) of this section, the individual has a closer connection during the current year to a single foreign country in which he or she maintains a tax home than to the United States.

(b) *Foreign country.* For purposes of section 7701(b) and the regulations thereunder, the term “foreign country” when used in a geographical sense includes any territory under the sovereignty of the United Nations or a government other than that of the United States. It includes the territorial waters of the foreign country (determined in accordance with the laws of the United States), and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the foreign country and over which the foreign country has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources. It also includes the possessions and territories of the United States.

(c) *Tax home—(1) Definition.* For purposes of section 7701 (b) and the regulations under that section, the term “tax home” has the same meaning that it has for purposes of section 162(a)(2) (relating to travel expenses while away from home). Thus, an individual’s tax home is considered to be located at the individual’s regular or principal (if more than one regular) place of business. If the individual has no regular or principal place of business because of the nature of the business, or because the individual is not engaged in carrying on any trade or business within the meaning of section 162(a), then the individual’s tax home is the individual’s regular place of abode in a real and substantial sense.

(2) *Duration and nature of tax home.* The tax home maintained by the alien individual must be in existence for the entire current year. The tax home must be located in the same foreign country for which the individual is claiming to have the closer connection